No. 16177

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LYNDOL L. YOUNG and MILDRED W. YOUNG,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the United States.

PETITIONERS' BRIEF.

FRANCIS J. McENTEE
LYNDOL L. YOUNG,
612 South Flower Street,
Los Angeles 17, California,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statute

No. 16177

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LYNDOL L. YOUNG and MILDRED W. YOUNG,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the United States.

PETITIONERS' BRIEF.

Statement Re Jurisdiction.

This Court has jurisdiction to hear and determine the petition of Lyndol L. Young and Mildred W. Young to review the decision of the Tax Court of the United States. The Decision of the Tax Court was entered April 7, 1958 [Tr. p. 79], following the Memorandum Opinion of the Tax Court entered December 13, 1957 [Tr. pp. 74-78].

The Petition for Review was filed June 11, 1958 [Tr. pp. 80-84].

Statement of the Case.

On March 9, 1955, the Commissioner of Internal Revenue determined a deficiency in petitioners' income taxes for the year ending December 31, 1952, of $7,705.78 [Tr.

pp. 9-12]. Petitioners had declared and paid the sum of $7,330.00 for the taxable year 1952 [Tr. pp. 59-62], and an additional sum of $739.80 on February 8, 1955; total tax paid for 1952—$8,069.80 [Tr. p. 59].

The above mentioned deficiency notice dated March 9, 1955, followed a hearing before the Appellate Division of the Internal Revenue Service between petitioner Lyndol L. Young and Messrs. Wulke and Graham, representatives of the Commissioner [Tr. pp. 12-15].

On May 19, 1955, following said deficiency notice the petitioners filed their petition with the Tax Court of the United States for a re-determination of the deficiency set forth by the respondent Commissioner in his notice of deficiency dated March 9, 1955 [Tr. pp. 3-15]. The respondent Commissioner filed his Answer thereto June 28, 1955 [Tr. pp. 16-17].

The hearing before the Tax Court took place on June 5, 1957, in Los Angeles, California, and was presided over by the Honorable John E. Mulroney, Judge of the Tax Court.

The proceedings before the Tax Court are set forth in the Transcript of Record at pages 17 to 58, inclusive. The hearing commenced at 11 o'clock A.M. and was concluded at 12:30 o'clock P.M. The Reporter's Transcript of the hearing was so garbled and confused by the reporter that it became necessary to correct the record by joint motion of the petitioners and respondent [Tr. pp. 53-58]. Notwithstanding the corrections that were made the transcript of the hearing still does not show all of the facts connected with the contentions of the petitioners concerning the item of business expenses which were taken as deductions by petitioners in their 1952 income tax return. Furthermore,

the Judge of the Tax Court at the hearing restricted the petitioner, Lyndol L. Young, who was the only witness who testified at the hearing, from stating in detail the many matters which he attended to for his clients in both his home and his clubs, in the following language:

> "The Court: Do we have to go into all the issues, here? All this litigation could be endless, I'm sure. All I'm interested in is how his home was used, and the Club was used, for these things, without telling us so much of the issues of these cases.
>
> The Witness: I think it would be better. I don't want to go into too much detail, yet I want to bring out the facts that these were essential matters.
>
> The Court: I will give you the utmost latitude in establishing your use of your home and your Club for business." [Tr. p. 34.]

Following this admonition from the Court petitioner did not go into the detail of many matters involved in the issues concerning petitioners' deductions for business expenses.

The opinion of Judge Mulroney also, contrary to the record, refers to the testimony of petitioner Lyndol L. Young as failing to show anything beyond the minimal use of his home for business purposes and that the evidence concerning the use by petitioner of his clubs for business purposes was meager and unsatisfactory, and that the testimony of petitioner regarding his travel expense in the claimed amount of $3,500.00 was based upon almost complete lack of evidence [Tr. pp. 74-78].

No Findings were made by Judge Mulroney either in his Memorandum Opinion or independently thereof although Findings were requested and submitted by petitioners [Sup. Tr. pp. 95-105].

The questions involved in this Petition for Review are:

1. The respondent Commissioner, after auditing the income tax returns of petitioners for the years 1948, 1949, 1950 and 1951, expressly approved the deductions made by petitioners in said years as a business expense of a portion of the maintenance and operating cost of petitioners' residence, where petitioner Lyndol L. Young conducted the major and substantial part of his law practice. The amount covering this deduction approved by the respondent Commissioner in the above mentioned years is as follows: 1948 the sum of $5,456.73; 1949 the sum of $4,747.76; 1950 the sum of $4,998.70 [Tr. pp. 35-36]. In the year 1951, after an audit of the income tax return of petitioners for said year, the respondent Commissioner approved the deduction as a business expense of the lump sum of $12,456.08, which included a portion of the maintenance and operation of the petitioners' home, which is the same home that is involved in the 1952 return, and club expenses and business cash disbursements [Tr. p. 36]. The same items of business expense for the year 1952 totalled the sum of $11,147.62, broken down as follows: The sum of $5,843.62 as a portion of the maintenance and operation expense of petitioners' home; the sum of $2,154.00 Club expenses; the sum of $3,150.00 for business cash disbursements; total $11,147.62 [Tr. p. 19].

Petitioners' gross income, which was received solely from the law practice of petitioner Lyndol L. Young, in the years involved from 1948 to 1951 was as follows: 1948, $35,000.00; 1949, $40,000.00; 1950, $39,650.00 [Tr. p. 14]; 1951, $50,000.00 [Tr. p. 36]. Petitioners' income for the year 1952, received solely from the law practice of petitioner Lyndol L. Young, was $62,000.00. It is, therefore, conclusive from the record in this case,

as well as the conduct of the respondent Commissioner in approving the same deductions for business expense in prior years in approximately the same amounts as claimed in the year 1952 is a definite ruling by the respondent Commissioner that the deductions claimed by petitioners in 1952 for their home expense, club expense and business cash disbursements are reasonable, ordinary and necessary. It is, therefore, obvious that the action of the respondent Commissioner in refusing to approve said business deductions in the amounts claimed for the year 1952 is arbitrary and contrary to his former ruling. For the same reason the Memorandum Opinion and Decision of the Tax Court of the United States is not supported by the evidence or the law. This statement is further supported by the fact that no Findings of Fact were made by the Tax Court.

2. Club expenses claimed by petitioner in the year 1952 amounted to the sum of $2,154.00 The respondent Commissioner reduced this sum to $1,008.00, which amount of money represented only the Club dues paid by petitioner, and disallowed the sum of $1,146.00 as business expense incurred by petitioner Lyndol L. Young at his clubs in connection with his law practice [Tr. pp. 5, 11, 19, 42, 69, 70].

3. Cash disbursement claimed by petitioners in 1952 were originally claimed in the sum of $3,650.00, but by agreement between Mr. Wulkle of the Appellate Division of the Internal Revenue Service and petitioner Lyndol L. Young this amount was reduced to $3,150.00, of which amount Mr. Wulke approved the allowance of the sum of $2,000.00 [Tr. p. 13]. Notwithstanding the fact that Mr. Wulke as the representative of the respondent Commissioner approved the sum of $2,000.00 as reasonable for this cash disbursement business expense [Tr. p. 13],

the statement of deficiency of the respondent Commissioner disallows this claimed expense in its entirety [Tr. p. 11].

4. Travel expense claimed directly connected with the law practice of petitioner Lyndol L. Young amounted to $3,500.00. The uncontradicted testimony of said petitioner, as well as the records of said petitioner examined by the representatives of the respondent Commissioner, show that the total travel expense for said year 1952 incurred by petitioners was $7,500.00, and that petitioners only claimed the sum of $3,500.00 to cover travel expense connected with petitioner's law practice. The respondent Commissioner reduced said claim for travel expense from $3,500.00 to $2,158.62 [Tr. pp. 4, 11, 19, 37-38].

Specification of Errors.

1. The Tax Court erred in that it did not make any Findings of Fact, either in the Memorandum Opinion of the Tax Court or independently thereof, although proposed Findings of Fact in favor of petitioners were expressly requested and submitted [Sup. Tr. pp. 95-105].

2. Any Findings of Fact claimed by respondent Commissioner as being set forth in the Memorandum Opinion of the Tax Court are not supported by the evidence, and are clearly erroneous.

3. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the petitioners did not sustain their burden to show that the expenditures made by petitioner Lyndol L. Young in the year 1952 in the sum of $5,843.62 as a business expense in connection with the partial maintenance of petitioners' residence, where petitioner Lyndol L. Young conducted the major part of his law practice, was reasonable, ordinary and necessary.

4. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that petitioners claimed the sum of $9,493.62 as a business deduction for the partial maintenance of petitioners' residence, where petitioner Lyndol L. Young conducted the major part of his law practice. The amount claimed by petitioner for this expense was the sum of $5,843.62.

5. The Court erred in that it decided, contrary to the uncontradicted evidence, that petitioners did not sustain their burden to show that the expenditures made by the petitioner in the year 1952 in the sum of $3,500.00 for business travel expense was reasonable, ordinary and necessary.

6. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the petitioners did not sustain their burden to show that the expenditures made by petitioner Lyndol L. Young in 1952 in the sum of $2,154.00 for Club business expense was reasonable, ordinary and necessary.

7. The Tax Court erred in that it entirely disregarded and made no reference in its Memorandum Opinion to the claim of petitioners in the sum of $3,150.00 as a business expense for cash disbursements made by the petitioner Lyndol L. Young in the year 1952 in connection with the maintenance of his law practice, although it appeared from the record that Mr. Wulke a representative of the Appellate Division of the respondent Commissioner approved the sum of $2,000.00 as reasonable for this expenditure.

8. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sole contention of petitioner Lyndol L. Young to establish the claim of $5,843.62 in connection with the partial maintenance of petitioners' residence, where petitioner Lyndol L. Young

conducted the major part of his law practice, was that petitioner Lyndol L. Young's gross income in the year 1952 was $61,000.00.

9. The Tax Court erred in that it disregarded the uncontradicted testimony of Lyndol L. Young in support of the contentions and claims of petitioners covering the deductions made by petitioner Lyndol L. Young for business expenditures in the year 1952. The petitioner Lyndol L. Young was the only witness who testified before the Tax Court. His testimony was uncontradicted and he was not otherwise impeached, and his testimony was not inherently improbable, and, therefore, should not have been disregarded by the Tax Court, although petitioner Lyndol L. Young is an interested party.

10. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sum of $750.00 allowed by the respondent Commissioner on taxpayers' claim of $5,843.62 for the partial maintenance of petitioners' residence, where petitioner Lyndol L. Young conducted the major part of his law practice, was reasonable and that the respondent Commissioner was right in disallowing the balance of said claim in the sum of $5,093.62.

11. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sum of $2,168.42 allowed by respondent Commissioner on petitioners' claim for $3,500.00 for travel expenses incurred by petitioner Lyndol L. Young which were connected with his law practice in the year 1952 was reasonable, and that the respondent Commissioner was right in disallowing the sum of $1,341.38 of said claim of $3,500.00.

12. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sum of $1,008.00

allowed by the respondent Commissioner on petitioners' claim for $2,154.00 for business Club expenses was reasonable, and that the respondent Commissioner was right in disallowing the sum of $1,146.00 of said claim for $2,154.00.

13. The Tax Court erred in that it disregarded the uncontradicted evidence that the respondent Commissioner in the years 1948, 1949 and 1950, after auditing the income tax return of petitioners for said years, approved and allowed as a business expense the partial maintenance of the residence of the petitioners at 138 North June Street, where petitioner Lyndol L. Young conducted the major part of his law practice, the sum of $5,456.73 in the year 1948; the sum of $4,747.76 in the year 1949; the sum of $4,998.70 in the year 1950.

14. The Tax Court erred in that it disregarded the uncontradicted evidence of petitioners that respondent Commissioner in the year 1951, after auditing the income tax return of petitioners for said year, approved and allowed as a business expense the lump sum of $12,456.08 for the same three claims involved in the year 1952, to wit, the partial maintenance of the residence of the petitioners at 138 North June Street, the Club expenses of petitioner Lyndol L. Young, the cash disbursements made by petitioner Lyndol L. Young in connection with his law practice. The amount approved and allowed by the respondent Commissioner covering the above mentioned three claims for the year 1951, to wit, the sum of $12,456.08, exceeds the amount claimed by petitioners in their 1952 return for the identical three business expense claims by the sum of $2,308.46, and the ruling of the respondent Commissioner approving said identical claims which are involved in the 1952 return of petitioners for the respective years 1948,

1949, 1950 and 1951, are binding on the respondent Commissioner for the year 1952 and subsequent years where the same claims have been asserted by the petitioners in approximate like amounts. Petitioner paid additional income tax assessments in the years 1948, 1949, 1950 and 1951 in reliance on the ruling of respondent Commissioner that said deductions which were so allowed and approved in the years 1948, 1949, 1950 and 1951 could be claimed by petitioners in subsequent years, including the year 1952, and would be allowed and approved. The respondent Commissioner is estopped from changing his previous ruling for the years 1948, 1949, 1950 and 1951, and in applying in the year 1952 a different arbitrary ruling highly prejudicial to petitioners covering the same deductions in approximately the same amounts as in said previous years on the sole specious ground that the Commissioner is not bound by the alleged determination of his agents for the previous years. The respondent Commissioner does not contend that his said ruling for said previous years was based upon a mistake of law or fact or that there was any misrepresentation by the petitioners.

Argument of the Facts.

As hereinabove mentioned the Tax Court did not make any Findings of Fact either in the Memorandum Opinion of Judge Mulroney or independently thereof, although Findings of Fact were expressly requested and submitted by the petitioners. The Memorandum Opinion likewise is not supported by the evidence in the following essential particulars, to wit: The Memorandum Opinion states with reference to the Club expense of petitioner Lyndol L. Young, amounting to $2,154.00, as follows:

> "In view of the meager and unsatisfactory evidence of the use of clubs for business purposes respondent's

> determination that an amount of $1,008.00 should be allowed for club expenses was reasonable. We hold respondent was right in disallowing $1,146.00 club expenses" [Tr. pp. 75, 76].

The undisputed evidence is that no portion of the club expenses incurred by petitioner Lyndol L. Young in 1952 was allowed, and that the sum of $1,008.00 represented only the club dues paid by said petitioner [Tr. pp. 11, 19, 42, 60, 75]. However, the uncontradicted testimony of petitioner Lyndol L. Young presents a very different picture and shows without dispute that over a period of many years, and including the year 1952, the petitioner Lyndol L. Young used his clubs almost exclusively for business purposes [Tr. pp. 17-58, incl.].

Under the title of "Business Promotional Expenses" the Memorandum Opinion of the Tax Court states as follows:

> "In our opinion, petitioner failed to show anything beyond a minimal use of his home for business purposes and in view of the nature of the evidence presented we believe that the respondent's allowance of $750.00 for this item was reasonable. We hold he was right in disallowing the balance of the claimed deduction" [Tr. p. 77].

The testimony of the petitioner Lyndol L. Young completely refutes the foregoing statement. To summarize his uncontradicted testimony, it appears from the Transcript of Record, pages 20-58 thereof, inclusive, that said petitioners purchased their home in 1927 at a cost of $70,000.00 and that when the respondent Commissioner arbitrarily refused to follow his previous ruling, and disallowed the reasonable portion of the maintenance of said home as a business expense, the petitioners sold said home for $40,000.00 and suffered a loss of $30,000.00. Said

petitioner further testified that upon resuming his law practice in 1936 said home was used continuously by him as an office directly connected with his law practice. He further spelled out the names of his clients who consulted him in said home over the period from 1936 to and including January 1955 when said home was sold. The clients named by said petitioner were Mrs. Katherine C. Iten and her daughter Mrs. Tierney, and with reference to these two particular clients the witness testified that they never at any time consulted said petitioner in his downtown office, and that he was continuously consulted by them during their lifetime in said home. Mrs. Tierney died in 1938 and Mrs. Iten died in 1943. Said petitioner was the co-executor and co-trustee of the Tierney Estate and Executor and Trustee of the Iten Estate. Said petitioner further testified that after Mrs. Tierney died he was appointed Testamentary Guardian of her children as to both their persons and estates, and that said children constantly came to the home of said petitioner and that the substantial and major legal and fiduciary services performed by said petitioner in connection with said estates were transacted in said home, and that from 1936 to the date of the hearing before the Tax Court, to wit, June 5, 1957, the petitioner had received from Mrs. Tierney and her estate the sum of $232,000.00 as fees and that he received during the same time from Mrs. Iten and her estate the sum of $150,000.00, and that in the year 1952 he received from the Iten Estate for his services a fee of $17,676.00, and from the Tierney Estate as fees in the year 1952 the sum of $12,000.00 [Tr. pp. 20-25].

Said petitioner further testified that in the year 1952 the Filor sisters, who resided in Arizona and who were clients of said petitioner and who consulted him in his

said home, paid said petitioner the sum of $25,000.00 [Tr. pp. 25-27]. (See, *Ann Filor Day, et al. v. United States,* C. C. H. U. S. Tax Cases, 57-1, Pars. 9269-9273.) Said petitioner further testified that the major and substantial legal services performed by him for his client Liberty Mutual Insurance Company for the period 1936 to and including the year 1954 were in said home. That he was consulted in said home by Mr. P. E. Titus, vice president and general manager of the Claims Department of Liberty Mutual Insurance Company; by Mr. P. H. Wilson, vice president of said company in San Francisco; Mr. Walker, regional Claims Manager; and Mr. Litchfield, who succeeded Mr. Walker as said regional Claims Manager in San Francisco, and that during said period he was paid the sum of $175,000.00 by Liberty Mutual Insurance Company for his legal services, which were substantially performed in said home. That in the year 1952 Liberty Mutual Insurance Company paid said petitioner the sum of $5,200.00 [Tr. pp. 28-32].

Said petitioner also referred to Mr. Richard W. Fewel as a client who consulted with petitioner in said home during the period from 1946 to 1952, and that he was paid by Mr. Fewel for said services a total sum of $62,000.00, which included the sum of $25,000.00 for services rendered to Mr. Fewel as Guardian for Linley Wood. Said petitioner further testified that he was consulted by Mr. Fewel not only in his home but also at his clubs [Tr. pp. 32-34].

The petitioners take the position that not only did petitioner Lyndol L. Young use his said home and clubs for business purposes in the year 1952, but that said home and clubs were used over a considerable period of time, including the year 1952, and that the same had to be avail-

able in order to be used by petitioner Lyndol L. Young in connection with his law practice and represented substantial investments by petitioners. It is therefore, obvious that the year 1952 is not the sole criterion upon which to base the business use of said home and said clubs, and, further, that the legal services rendered by petitioner in said home and said clubs to his clients in one particular year in all probability would not be paid for until subsequent years. Therefore, it is proper to consider the period of time involved when said petitioner used said home for business purposes, to wit, from the year 1936 to 1955, during which period the record shows petitioner received for his said legal services rendered in said home and said clubs a substantial sum of money from his clients.

Insofar as the Los Angeles Country Club is concerned, said petitioner testified that in the year 1956 the use of said club was solely responsible for the attorney-client relationship between petitioner Lyndol L. Young and his associate Francis J. McEntee and the Price Estate. Furthermore, that numerous meetings and conferences were held at said club with Mrs. Price and her son, John K. Price, and Mr. Ferguson of the Security-First National Bank, co-executor [Tr. pp. 34, 35].

Petitioner Lyndol L. Young's uncontradicted testimony completely demonstrates that the use of said petitioner's home and his clubs for business purposes connected with his law practice justifies the modest amounts claimed as business expenses in connection therewith in their 1952 returns. The total expense of maintaining said home for the year 1952 was approximately $20,000.00 [Tr. p. 48]. The amount claimed by petitioner for the portion of said sum of $20,000.00 for the business use of said home was only $5,843.62, which amount follows a formula estab-

lished by the respondent Commissioner in his ruling covering the years 1948, 1949, 1950 and 1951. The total business club expense claimed by petitioner Lyndol L. Young in 1952 for all of his clubs, to wit, The Los Angeles Country Club, The Beach Club and the Los Angeles Stock Exchange Club was only $2,134.00. Certainly this sum of money is a modest business expense for the evidence conclusively showed that petitioner Lyndol L. Young received substantial fees from his clients which more than justifies the amount of club expense claimed in 1952.

Under the title "Travel Expense" the Memorandum Opinion of the Tax Court states as follows:

> "Petitioner claimed a deduction for travel expenses in the sum of $3,500. Respondent allowed $2,158.62. The vague and inconclusive evidence petitioner introduced would hardly support the allowance granted. It consists merely of statements by the petitioner that he spent the sums claimed on business trips. He mentioned a few trips such as a trip he said he made to Boston to confer with a client. His wife accompanied him and they visited their daughter in Newport, Rhode Island. He and his wife also journeyed to Hawaii where they stayed in a $60 a day hotel room for three weeks. He testified 'part of the trip was to conduct an inquiry with reference to the wife of a client of mine who was then in Honolulu at the Royal Hawaiian Hotel, which inquiry was conducted.' He claimed $1,500 of the expenses of this trip as business travel expense. Respondent conceded that such a three week trip to Hawaii would cost $1,500, but the proof that it was a business trip is insufficient. The rest of the evidence on this item is nothing more than a general statement of petitioner that the balance of the travel expense is connected with 'local matters, going to Arizona in 1952 * * * La Jolla,

San Diego, and trips in connection with these insurance company cases where bad accidents occurred, down at Palm Springs.'

The almost complete lack of evidence to support the claimed travel expenses means respondent's determination disallowing a deduction of $1,341.38 for travel expenses is sustained."

The foregoing statement is completely contradicted by the testimony of the petitioner, which would have been in more detail concerning all of the trips involved in the claim of $3,500.00 for travel expenses but for the admonition by the Judge of the Tax Court that the Court was not interested in the details involving the issues in the cases where petitioner represented his clients. Following this admonition petitioner limited the details concerning said services, as well as his testimony concerning the various services rendered by him on the trips covered in the claim for $3,500.00 for travel expenses.

With reference to the sum of $1,500.00 claimed by petitioner as travel expense for a business trip to Honolulu, the report of the representative of the respondent Commissioner, to wit, Mr. Morris, shows that the total cost of said trip was $2,682.76, of which amount one-half thereof, $1,341.38, was allowed by said representative of the respondent Commissioner and approved by the respondent Commissioner in his letter dated August 24, 1954 [Tr. pp. 65-73].

Petitioner claimed the sum of $1,500.00 to cover the business expense connected with the Honolulu trip. At the hearing Judge Mulroney inquired as follows:

"The Court: How much was claimed for this one trip?

The Witness: $1,500.00.

The Court: And you stayed how long?

The Witness: Three weeks, 21 days.

The Court: Does the Government contest the amount of that trip as $1,500.00 for a trip to Hawaii and staying three [23] weeks.

Mr. Reardon: No, your Honor."

We, therefore, have the approval of the respondent Commissioner, based upon the report of his representative Mr. Morris, of the sum of $1,348.38 for said Honolulu trip, and the statement by the Government attorney to the Court that the Government did not contest the sum of $1,500.00 to cover the Honolulu trip. It is, therefore, quite inconsistent for the Memorandum Opinion to state that the respondent Commissioner conceded that such a three-week trip to Hawaii would cost $1,500.00 but the proof that it was a business trip is insufficient. The record completely refutes this dicta in the Memorandum Opinion. Petitioner Lyndol L. Young further testified that the sum of $1,000.00 was allocated as a business expense for a trip to Boston, Massachusetts, where he conferred with the executives of his client The Liberty Mutual Insurance Company. It further appeared from said petitioner's testimony that this particular client had paid said petitioner the sum of $175,000.00 as legal fees [Tr. p. 38]. Petitioner further testified that the sum of $1,000.00 was allocated as a business expense for trips made to the State of Arizona, La Jolla, San Diego and Palm Springs for the purpose of representing his clients. The trips to Arizona were connected with the estate of J. E. Thompson, and with the legal affairs of his widow, and also to confer with the Filor sisters, clients of said petitioner, who paid him a fee of $25,000.00 in 1952, as hereinabove specifi-

cally referred to. (See *Ann Filor Day, et al. v. United States, supra.*) The other trips, to La Jolla and San Diego, were likewise to confer with Mrs. Thompson during the summer months of 1952 when Mrs. Thompson was living in La Jolla, and on behalf of the Liberty Mutual Insurance Company. These trips include railroad and airline transportation fares, hotel accommodations and expense money en route to the various states and cities where said petitioner travelled. It further appeared from the testimony of said petitioner that his total travel expense for the year 1952 was $7,500.00, and that only the sum of $3,500.00 was allocated as a business expense directly connected with said petitioner's law practice. There is no question involved concerning the correctness of this disbursement as it conclusively appears from the record that petitioner's vouchers and checks were examined and verified by Mr. Morris, the representative of the respondent Commissioner [Tr. pp. 51, 65-73].

Argument of the Law.

The Memorandum Opinion states:

> "The respondent allowed a portion of each item and the record here, *consisting only of petitioner's testimony,* is designed to establish that additional allowances should have been made. Since the question is purely one of fact upon which the petitioner had the burden of proof, we can discuss the evidence with respect to each item separately" [Tr. p. 75; emphasis added].

The foregoing quotation clearly indicates that the deduction claimed by petitioners for business expense was authorized by the statute. So far as the reasonableness of the respective amounts claimed is concerned the uncon-

tradicted testimony of petitioner Lyndol L. Young, and the previous rulings of the respondent Commissioner in the years 1948, 1949, 1950 and 1951 when considered with the arbitrary action of the respondent Commissioner in drastically changing his formula established by him in said prior years without notice to petitioners, and with great prejudice to them, clearly indicates that a mistake has been made in this case by the decision of the Tax Court. Petitioners repeat that no Findings of Fact were made by the Tax Court. Even though the Memorandum Opinion had set forth Findings of Fact in line with the tenor of said Memorandum Opinion, still such Findings would not be supported by the undisputed evidence. In the case of *McGah v. Commissioner of Internal Revenue,* 210 F. 2d 769, at page 771, this Court states the rule as follows:

> "[4] Petitioner urges that there is no substantial evidence to support such a finding. While giving careful consideration to the finding of the Tax Court, we draw our own inferences from undisputed facts. Gillette's Estate v. Commissioner of Internal Revenue, 9 Cir., 1950, 182 F. 2d 1010; Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 9 Cir., 1949, 178 F. 2d 541. A consideration of the entire evidence leaves us with the firm conviction that a mistake has been made in this case."

In the case of *Wener v. Commissioner of Internal Revenue,* 242 F. 2d 938 at pages 944 and 945, this Court states:

> "[6-8] A. *The Scope of Review.*
>
> "Under the law, the scope of our review, in cases of this character, is the same as on appeal
>
> > 'from decisions of district courts in civil actions tried without a jury.'
>
> "The findings of the Tax Court will not be disturbed unless clear error appears. But concededly

when the facts are not in dispute and wrong legal conclusions are attached to them, we are not bound to respect them but may draw different and correct ones of our own.

"[9] In the case before us, the findings are based chiefly upon stipulated facts and documentary evidence. The only witness who testified before the Tax Court was one of the taxpayers, Harold Wener. His testimony related to the circumstances under which the threatened failure of his business venture in California compelled him to conduct the negotiations which resulted in the agreement to accept $35,000 in cash for the three installments not yet due. *His testimony was not contradicted. He has not been otherwise impeached and his testimony not being inherently improbable, cannot be disregarded, although he is an interested party*" (citing cases in footnote 22; emphasis added).

The Memorandum Opinion, as above indicated by the added emphasis, seems to belittle the petitioner's testimony as insufficient to sustain the burden of proof placed on petitioners. The respondent Commissioner offered no evidence of any kind. It appears from all of the records of the respondent Commissioner, as well as the testimony of the petitioner Lyndol L. Young that all of the claims concerning the amounts expended by petitioners as business expense were verified by the representatives of the respondent Commissioner in checking the records of said petitioners. Under these circumstances the applicable rule is well stated in the following cases, to wit:

In the case of *Blackmer v. Commissioner of Internal Revenue,* 70 F. 2d 257, the Court states:

"The expenses were therefore ordinary and necessary expenses. Although the sums were substantial,

the Board should not have refused the deduction. It is said that the amount was not established with absolute certainty. But the deduction should have been allowed, since it appears in the record that the amount claimed was reasonable under all the circumstances. Not only was all of it expended for business purposes, but, as the taxpayer testified, even a larger sum was. Cohan v. Comm'r., 39 F. (2d) 540 (C. C. A. 2). When the evidence before the Board as the trier of the facts, ought to be convincing, it may not say that it is not. Sioux City Stockyard Co. v. Comm'r., 59 F. (2d) 944 (C. C. A. 8); Conrad & Co. v. Comm'r., 50 F. (2d) 576 (C. C. A. 1); Chicago Ry. Equipment Co. v. Blair, 20 F. (2d) 10 (C. C. A. 7). And the Board may not arbitrarily discredit the testimony of an unimpeached taxpayer so far as he testifies to facts. A disregard of such testimony is sufficient for our holding that the taxpayer has sustained the burden of establishing his right to a reduction and error has been committed in a contrary ruling. Boggs & Buhl v. Comm'r., 34 F. (2d) 859 (C. C. A. 3).

"The amounts here sought to be deducted as ordinary and necessary expenses should have been allowed in the calculation of the petitioner's tax."

The Memorandum Opinion of the Tax Court under the title "Business Promotional Expenses" states as follows:

"Petitioner's main argument to establish this item is (1) his claim is reasonable in view of his gross income ($61,000.00), and (2) that similar amounts had been allowed in previous years. There is nothing to his first argument as his burden was to show actual expenditures for a business purpose. His burden is not satisfied merely by testifying a substantial portion of his law business was carried on in his home and then allocating a certain sum from gross income as

> home business expense. As to the second argument, the law is clear that respondent is not bound by determinations of his agents for earlier years. South Chester Tube Company, 14 T. C. 1229. See also H. L. McBride, 23 T. C. 901" [Tr. pp. 76, 77].

So far as the above quoted statement in said Memorandum Opinion is concerned to the effect that petitioner Lyndol L. Young merely testified that a substantial portion of his law business was carried on in his home, and then allocating a certain sum from gross income as a business expense, does not satisfy petitioner's burden is not supported by the record. The testimony of said petitioner, as hereinabove set forth, specifically names the clients and the character of their legal business where the services were rendered from his home, and if there is any criticism concerning the extent and detail of petitioner's testimony in this respect, it is not the fault of the petitioner because said petitioner was restricted by the trial Judge from going into the detail involved in the matters concerning his clients which were performed in his home. As to the statement in said Memorandum Opinion that the petitioner contends that his claim is reasonable solely in view of his gross income of $61,000.00, this is contrary to the petitioner's testimony. On this subject matter the petitioner testified as follows:

> "Q. Is it true that your sole reason, on the basis for taking these deductions, is that you regarded in view of your gross income these amounts were reasonable? A. Well, I felt that they were reasonable to the extent of the cost of the maintenance of the premises, and there was a reasonable allocation to the over-all cost, yes, and I also thought in relation to the income received in the year 1952, it was a reasonable

allocation of expense. The total expense of maintaining my home in 1952 was approximately $20,000.00" [Tr. pp. 47, 48].

* * * * * * * *

"Q. And your entire basis of claim of these deductions was your estimate of these amounts as being reasonable and in relation to your gross income? A. Yes, and in addition to that, to the matters, from my records, which are reviewed, covering the service, my legal service, and in cases I handled in 1952, the amount of work that appeared from those records I did in my home, and at the Country Club as well, and the Stock Exchange Club" [Tr. pp. 49, 50].

So far as the statement above quoted from the Memorandum Opinion is concerned to the effect that the law is clear that respondent Commissioner is not bound by the determinations of his agents of earlier years and then citing the two Tax Court cases referred to, this alleged legal proposition certainly is not supported by the law. The two cited Tax Court cases both in law and fact are clearly distinguishable from the evidence which was before the Tax Court in the petitioners' case. The respondent Commissioner is estopped from arbitrarily changing a ruling made by him in previous years unless said ruling was made upon a mistake of law or fact or misrepresentation or fraud on the part of the taxpayers. We cited to the Tax Court the controlling case on this subject matter, to wit, *H. S. D. Company v. Kavanagh,* 191 F. 2d 831, 843-846, inclusive. No consideration whatever was given by the Tax Court to this authority which clearly supports the position of the petitioners. Under the recent decision of the Supreme Court of the United States in the case of *Automobile Club of Michigan v. Commissioner,* 1 L. Ed. 749, the

question of the authority or right of the Commissioner to change his previous rulings is limited to a case where the Commissioner in said previous rulings made a mistake of law; the Supreme Court in this respect having made the following declaration:

> "The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law."
>
> * * * * * * * *
>
> "Petitioner's reliance on *H. S. D. Company v. Kavanagh* (C. A. 6th Mich.), 191 F. 2d 831; and *Woodworth v. Kales* (C. A. 6th Mich.), 26 F. 2d 178, is misplaced because those cases do not involve correction of an erroneous ruling of law."

There is no claim made by the respondent Commissioner in petitioner's case that the rulings of the Commissioner prior to 1952 which approved the business expense deductions made by petitioners were based on any mistake of law or fact or the result of any misrepresentation or fraud on the part of petitioners. The respondent Commissioner is, therefore, estopped from arbitrarily reversing his previous ruling to the great prejudice and detriment of petitioners.

Findings of Fact by the Tax Court in all cases decided by said Court are mandatory as a matter of law:

> Int. Rev. Code, 1954, Sec. 7459 (Rule 52-A, F. R. C. P.);
>
> *Winnett v. Helvering,* 68 F. 2d 614, 615;
>
> *Beldridge Oil Company v. Helvering,* 69 F. 2d 432, 433;
>
> *Diller v. Commissioner of Internal Revenue,* 91 F. 2d 194, 195;

Kelleher v. Commissioner of Internal Revenue, 94 F. 2d 294, 296;

Bell v. Commissioner of Internal Revenue, 139 F. 2d 147, 149;

Irish v. United States, 225 F. 2d 3, 8;

MacCrowe's Estate v. Commissioner of Internal Revenue, 240 F. 2d 841, 842.

Where the evidence is undisputed, as the record in this case discloses, this Court has the right to make its own evaluation of the conclusions to be determined from the facts established by the evidence. Although there are no Findings of Fact by the Tax Court in this case, it conclusively appears that in view of the undisputed evidence the Tax Court could not make valid Findings of Fact in favor of the respondent Commissioner. Under these circumstances petitioners respectfully submit that this Court should rule as a matter of law that the decision of the Tax Court is erroneous, and reverse said decision with directions to the Tax Court to enter Judgment in favor of the petitioners and allowing the business expense claims ot said petitioners as follows, to wit, home expense $5,843.62; club business expenses $2,154.00; business cash disbursements $3,150.00; business travel expense $3,500.00. The evidence supporting these claims in the amounts stated is undisputed and uncontradicted.

In the case of *Helvering v. Taylor,* 293 U. S. 507, 515, 79 L. Ed. 623, the rule is stated by the Supreme Court of the United States as follows:

> "Unquestionably the burden of proof is on the taxpayer to show that the Commissioner's determination is invalid * * * Frequently, if not quite generally, evidence adequate to overthrow the Commissioner's finding is also sufficient to show the correct amount,

if any, that is due * * * But where, as in this case, the taxpayers' evidence shows the Commissioner's determination to be arbitrary and excessive, it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him."

See also:

Gillette's Estate v. Commissioner of Internal Revenue, 182 F. 2d 1010, 1013, 1014;

E. H. Sheldon & Co. v. Commissioner of Internal Revenue, 214 F. 2d 655, 658, 659;

Consolidated Naval Stores Company v. Fahs, 227 F. 2d 923, 925, 926, 927;

Maytag v. Commissioner of Internal Revenue, 187 F. 2d 962, 964;

Durwood v. Commissioner of Internal Revenue, 159 F. 2d 400, 405.

Respectfully submitted,

Francis J. McEntee,

Lyndol L. Young,

Attorneys for Petitioners.

APPENDIX.